IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
January 30, 2008 Session

STATE OF TENNESSEE v. DONNA MARIE IKNER

Direct Appeal from the Criminal Court for Knox County
Nos. 81935, 85703-85712, 85721-85723, 85726-85728 Ray L. Jenkins, Judge

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No. E2007-00943-CCA-R3-CD - Filed June 30, 2008

The appellant, Donna Marie Ikner, pled guilty in the Knox County Criminal Court to one count of aggravated burglary, three counts of burglary, one count of felony theft, one count of reckless aggravated assault, eleven counts of burglary of a vehicle, and one count of credit card fraud and, pursuant to the plea agreement, received an effective sixteen-year sentence. On appeal, the appellant contends that the trial court committed reversible error by (1) refusing to allow her to serve her effective sentence in an alternative to confinement without offering her the opportunity to withdraw her guilty pleas and (2) refusing to allow her to make a statement in her own behalf at her sentencing hearing. Based upon the record and the parties' briefs, we conclude that the trial court was not bound by the plea agreement to order alternative sentencing but that the trial court committed reversible error by failing to warn the appellant that she would not be allowed to withdraw her pleas if the trial court did not follow the State's recommendation that she receive alternative sentencing. We also conclude that the trial court committed reversible error by not allowing the appellant to make a statement in her own behalf. The judgments of the trial court are vacated without prejudice to further proceedings on the underlying charges, and the case is remanded.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court are Vacated and the Case is Remanded.

NORMA MCGEE OGLE, J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., and D. KELLY THOMAS, JR., JJ., joined.

J. Liddell Kirk, Knoxville, Tennessee, for the appellant, Donna Marie Ikner.

Robert E. Cooper, Jr., Attorney General and Reporter; Rachel West Harmon, Assistant Attorney General; Randall E. Nichols, District Attorney General; and William Jeff Blevins, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

I. Factual Background

The record reflects that the appellant was charged by presentment or indictment in seventeen different cases with one count of aggravated burglary, two counts of aggravated assault, nine counts of burglary, twelve counts of burglary of a vehicle, five counts of theft, fourteen counts of misdemeanor theft, two counts of fraudulent use of a debit card, two counts of attempted fraudulent use of a debit card, and one count of trespass for crimes committed between December 2004 and October 2, 2006. In a written Waiver of Trial by Jury and Request for Acceptance of Plea of Guilty, the appellant agreed to plead guilty to one count of aggravated burglary, a Class C felony; three counts of burglary, a Class D felony; one count of reckless aggravated assault, a Class D felony; eleven counts of burglary of a vehicle, a Class E felony; one count of Class D felony theft; and one count of credit card fraud, a Class E felony. Pursuant to the plea agreement, the appellant was to receive a sixteen-year sentence as a Range II, multiple offender.

Prior to the appellant's March 7, 2007 guilty plea hearing, the appellant signed a written plea agreement. Concerning the manner of service of the effective sentence, the plea agreement stated, "Agreed to BoPP Enhanced Probation (or CAP program) Supervision & Knox [C]ounty Drug Court for Ikner." At the guilty plea hearing, the State informed the trial court that the appellant "will apply for Enhanced Probation or CAPP and Knox County Drug Court. The State will agree at the presentence hearing that she's a suitable candidate for either Enhanced or CAPP and Drug Court, if they agree to take her." The trial court asked the State, "[I]s there a referral . . . to probation?" and the State answered, "Yes, your Honor." The appellant's attorney then told the court that "since this is an agreed time and agreed receipt of some form of supervised release, either regular Enhanced or CAPP, we would ask the Court to potentially expedite [the appellant's probation application], if possible." The trial court asked the appellant if she wanted to say anything. The appellant said no, and the trial court told her that she would have another opportunity to address the court at her next hearing. The trial court accepted the appellant's guilty pleas, sentenced her to an effective sixteen-year-sentence, and concluded the guilty plea hearing by stating as follows:

> On your application for consideration for Enhanced Probation or Community Alternative to Prison Program and consideration by the Knox County Drug Court, judgment is reserved. This matter is referred for expedited consideration by those organizations and set for hearing on March 30th, or as soon thereafter that it can be reached on the docket.

At the March 30, 2007 hearing, the appellant's attorney informed the trial court that "Enhanced" had not recommended the appellant for its program but that CAPP was willing to accept her on the condition that she live in a halfway house. The defense asked that the appellant, who had been confined in jail, be released into her grandmother's custody until a bed at the halfway house became available and told the court that the waiting list for a bed was "significantly long." The State opposed such an arrangement, telling the trial court that the defense was trying to "tweak" the plea agreement and that "[t]urning her loose and letting her go back with her grandmother with no other supervision than that . . . would be doing the community a serious disservice." A probation officer

in the courtroom agreed with the State, stating that the appellant should remain in custody until a bed at the halfway house became available. However, the trial court said that based upon the appellant's criminal record and the number of crimes, "I don't think that I could agree to that." The trial court said that it had read one of the victim's impact statements and that it was not bound by the plea agreement. During this hearing, defense counsel said,

> We had an agreed sentence, Judge, of -- with the State when Ms. Ikner entered into this plea that it was agreed that she would receive one of these types of supervision, Judge. While the State cannot technically allow someone or agree [for] someone . . . prior to a P.S.I. report being compiled, Judge. Part of the reason of -- of Ms. Ikner willingly entering into all of these pleas regarding all of her multitude of dockets was under the assumption that if she's eligible for some kind of release, that she would be released into the supervision of one of those programs, Judge.

The following exchange also occurred:

> [The State]: See, the situation is, your Honor, [defense counsel] and I both understand that any recommendation we make, of course, is subject to the Court's approval. [Defense Counsel] is aware of that, and I'm sure he's made his client aware of that when she asks for probation, she may or may not get it. The ultimate decision --
>
> [Defense Counsel]: Is the judge.
>
> [The State]: -- is -- sits behind the bench when this happens.

The appellant's attorney urged the trial court to allow the appellant to serve her sentence in the CAPP program where she could receive rehabilitation for her drug addiction. The trial court stated, "Don't get arrested on . . . drug-related offenses and come to this court pleading drugs." The trial court decided to postpone its ruling on alternative sentencing because it did not want to sentence the appellant "while my blood is this hot."

At the final sentencing hearing on April 5, 2007, the trial court refused to allow the appellant to serve her sentence in an alternative to confinement, stating that confinement was necessary to protect society from a defendant who has a long history of criminal conduct and in order to avoid depreciating the seriousness of the offenses. The court also stated that it had reread the appellant's presentence report[1] and that her behavioral record, employment history, social history, present physical and mental condition, apparent lack of remorse, addiction to controlled substances, being charged with additional offenses pending her probation hearing, and lack of self-discipline

[1]The appellant did not include the presentence report in the appellate record.

"thoroughly convinced [the court] that if this defendant was released on any type of probation program that we would be back here within a short period of time." The appellant's attorney stated that the appellant wanted to make a brief statement, but the trial court said, "I just made my ruling. I don't think it's going to help any." The appellant was not allowed to speak. On appeal, the appellant contends that the trial court erred by rejecting the terms of her plea agreement without offering her the opportunity to withdraw her guilty pleas and by refusing to allow her to make a statement in her own behalf.

II. Analysis

A. Plea Agreement

The appellant contends that the trial court erred by rejecting the terms of her plea agreement without giving her the opportunity to withdraw her pleas. Specifically, she contends that she pled guilty pursuant to Tennessee Rule of Criminal Procedure 11(c)(1)(C) in return for an effective sixteen-year sentence to be served in an alternative to confinement and, therefore, that the trial court was required to allow her to withdraw her pleas under Tennessee Rule of Criminal Procedure 11(c)(5)(B) when it ordered her to serve her effective sentence in confinement. The State argues that the sentences in the plea agreement were only recommendations and, therefore, that the trial court was not required to allow the appellant to withdraw her pleas when it denied her request for alternative sentencing. See Tenn. R. Crim. P. 11(c)(1)(B). We conclude that the alternative sentence set out in the plea agreement was a nonbinding recommendation and, therefore, that the trial court did not err when it sentenced the appellant to confinement without giving her the opportunity to withdraw her pleas.

Tennessee Rule of Criminal Procedure Rule 11(c)(1) provides that if a defendant pleads guilty,

> the plea agreement may specify that the district attorney general will:
>
> > (A) move for dismissal of other charges;
> >
> > (B) recommend, or agree not to oppose the defendant's request for, a particular sentence, with the understanding that such recommendation or request is not binding on the court; or
> >
> > (C) agree that a specific sentence is the appropriate disposition of the case.

If the type of plea agreement is a Rule 11(c)(1)(A) or 11(c)(1)(C) agreement, "the court may accept or reject the agreement . . . or may defer its decision until it has had an opportunity to consider the presentence report." Tenn. R. Crim. P. 11(c)(3)(A). Upon accepting the plea agreement, "the

court shall advise the defendant that it will embody in the judgment and sentence the disposition provided in the plea agreement." Tenn. R. Crim. P. 11(c)(4). If, however, the court rejects the agreement, it must do the following on the record and in open court:

> (A) advise the defendant personally that the court is not bound by the plea agreement;
>
> (B) inform the parties that the court rejects the plea agreement and give the defendant an opportunity to withdraw the plea; and
>
> (C) advise the defendant personally that if the plea is not withdrawn, the court may dispose of the case less favorably toward the defendant than provided in the plea agreement.

Tenn. R. Crim. P. 11(c)(5). If the type of plea agreement is a Rule 11(c)(1)(B) agreement, "the court shall advise the defendant that the defendant has no right to withdraw the plea if the court does not accept the recommendation or request." Tenn. R. Crim. P. 11(c)(3)(B).

The appellant contends that her agreement was a Rule 11(c)(1)(C) or "Type C" contingent agreement while the State argues that it was a Rule 11(c)(1)(B) or "Type B" noncontingent agreement. However, a plea agreement can be a combination of both types of agreements.

> A simple example should illustrate the type of contingent and noncontingent agreements contemplated. The state may agree that in exchange for a plea to burglary the state will recommend four years and that at the time of the sentencing hearing the state will recommend probation but the latter is a nonbinding recommendation. Two separate agreements have thus been made. The first, the four years, is a (c)(1)(C) agreement. The defendant's plea is wholly contingent on getting exactly four years. The sentence is not binding on the court but the alternative to rejection of the sentence agreement is a potential withdrawal of the plea. The second agreement, the recommendation of probation, is, under this example, a (c)(1)(B) agreement. The plea is contingent only on the state's recommendation of probation and not on probation actually being granted. If the court denies probation the defendant cannot withdraw the plea.

Tenn. R. Crim. P. 11, Advisory Commission Comments.

Turning to the instant case, our review of the appellant's written plea agreement, which she signed, reveals that the last two lines on page six provide,

> I understand that the possible punishments for the offense(s) to which I am pleading guilty are as follows and that as a result of my plea of guilty, the District Attorney General or his representative will recommend the following sentence as to each offense. I understand that this is only a recommendation and that the Court is not bound by this recommendation in any way."

(Emphasis original.) On the next page of the agreement, the following is printed at the top of the page: "Recommended Sentence Structure (by plea-bargain agreement between the parties) - **ALL OTHER CASES / COUNTS TO BE DISMISSED**." Beneath that heading is listed each offense to which the appellant is pleading guilty and the "**Recommended Sentence**" for each offense. Beneath the list, the agreement states at the bottom of the page, "**Agreed-to BoPP Enhanced Probation (or CAP[P] program) Supervision & Knox [C]ounty Drug Court for Ikner.**" (All emphases in original.) The written agreement's last two sentences, which appear just above the appellant's signature, state, "I understand that the District Attorney General may make a recommendation to the Court about what my sentence(s) should be. I understand that the Court is not bound to follow this recommendation."

At the appellant's guilty plea hearing, the trial court accepted her pleas, sentenced her to an effective sixteen-year sentence, and stated that "[t]he agreement announced will be incorporated in the judgment." At the conclusion of the hearing, the trial court said that it was reserving its decision as to the appellant's request for alternative sentencing and that a second hearing would be held on the matter. The trial court obviously treated the agreement like the example in the Advisory Commission Comments to Rule 11 and considered the manner-of-service portion of the plea agreement to be a "Type B" agreement, believing that it was not bound to the agreement's alternative sentencing recommendation. Although the written plea agreement states that a probationary sentence was "agreed-to," Rule 11(c)(2)(A) requires that the "parties . . . disclose the plea agreement in open court on the record," and when they did so in the present case, the agreement was described as one whereby the defendant would "apply" for specified programs and the State would accept such placement "if [one of the programs would] agree to take her." (Emphasis added.) Moreover, we infer from the record that the Knox County programs identified in the plea agreement were more exclusive than regular probation and that, under such regime, one's entry into one of the programs was conditional and involved an acceptance by the program administrator. We must view the plea agreement against that background.

Furthermore, the appellant did not object to having an alternative sentencing hearing or inform the court that her guilty pleas were contingent upon her being sentenced to probation. Additionally, at the March 30 hearing, the appellant's attorney acknowledged that the decision regarding the appellant's request for alternative sentencing ultimately rested with the trial court. We also note that during the March 30 hearing, the appellant's attorney acknowledged that the appellant would receive an alternative sentence "if she's eligible for some kind of release" and stated that he "was under the impression that since CAPP was going to take her that she was most likely going to be released, should she be placed upon CAPP, judge." (Emphasis added.) While the parties should

have specifically stated in the written plea agreement whether the agreement was a "Type B" agreement, a "Type C" agreement, or a combination of both types, the wording in the written agreement and the parties' statements at the hearings persuade us that the trial court did not err by treating the manner-of-service portion of the agreement as a "Type B" agreement. Therefore, upon accepting the plea agreement, the trial court was not required to sentence the appellant to a sentence alternative to confinement.

In support of her argument that the plea agreement was a "Type C" agreement, the appellant notes that the trial court failed to advise her pursuant to Tennessee Rule of Criminal Procedure 11(c)(3)(B) that she would not be allowed to withdraw her guilty pleas if the trial court failed to allow her to serve her effective sentence in a sentence alternative to confinement. Our review of the guilty plea hearing transcript confirms that the trial court failed to warn the appellant that she would not be allowed to withdraw her pleas, a requirement for "Type B" agreements." "The essence of Rule 11(c)(3)(B) is for the court to so advise the defendant at the time of the plea." Tenn. R. Crim. P. 11, Advisory Commission Comments.

We note that the written plea agreement also failed to advise the appellant that she would not be allowed to withdraw her pleas if the trial court did not follow the State's recommendation for alternative sentencing. Under the circumstances of this case, we believe that such error by the trial court, combined with an omission in the written agreement, seriously calls into question the knowingness of the appellant's guilty pleas. See United States v. Gillen, 449 F.3d 898, 903-04 (8th Cir. 2006) (providing that the trial court's failing to advise the defendant that he would not be allowed to withdraw his plea was harmless error when the written plea agreement, signed by the defendant, included the warning and the defendant indicated at the guilty plea hearing that he understood the agreement). This is especially true given that the written agreement referred to the appellant's "agreed-to" alternative sentence and that the State made the following comments at the March 30 hearing:

> Turning her loose and letting her go back with her grandmother . . . would be doing the community a serious disservice . . . . That's why CAPP's willing to accept her, is if she will be supervised. And she'll receive . . . closer structured living in a halfway house. We think that is the appropriate placement. That is what our agreement was. [The appellant] is trying to tweak it and change it just a little bit, that she gets turned loose and go into the custody of her grandmother. That wasn't our agreement. Our agreement was these two things here. . . . We think that she should be placed on CAPP based on their recommendations and should be under the requirements that they . . . set out in their report, because she needs that sort of structured environment.

Therefore, we cannot conclude that the trial court's error was harmless, and the appellant's convictions based upon her guilty pleas are vacated.

B. Statement in Her Own Behalf

The appellant also contends that the trial court erred by refusing to allow her to make a statement in her own behalf. The State argues that the appellant waived this issue and that the trial court never outright denied her request to make a statement. We conclude that the trial court committed reversible error by not allowing the appellant to speak in her own behalf.

During the appellant's guilty plea hearing, the trial court asked her if she wanted to make a statement, and she said no. The trial court advised her that she would have another opportunity to address the court at a subsequent hearing, "so you're not completely closing the door now." At the April 5, 2007 hearing, the trial court announced that it was denying the appellant's request for alternative sentencing. The following exchange then occurred:

> [Defense Counsel]: Can the defendant be heard, Judge? She'd like to make a brief statement.
>
> THE COURT: I just made my ruling. I don't think it's going to help any.
>
> [Defense Counsel]: Thank you, your Honor.
>
> THE COURT: Thank you.

Tennessee Code Annotated section 40-35-210(b)(7) provides that in determining a defendant's sentence, the trial court shall consider any statement the defendant wants to make in her own behalf about sentencing. Often referred to as allocution, allocution is defined as "the formality of the court's inquiry of a convicted defendant as to whether he has any legal cause to show why judgment should not be pronounced against him on the verdict of conviction." State v. Stephenson, 878 S.W.2d 530, 550 (Tenn. 1994). It is "an unsworn statement from a convicted defendant to the sentencing judge or jury in which the defendant can ask for mercy, explain his or her conduct, apologize for the crime, or say anything else in an effort to lessen the impending sentence. This statement is not subject to cross-examination." Black's Law Dictionary 75 (7th ed. 1999). "It is settled that a failure to comply with the mandate of [allocution] ordinarily requires vacation of the sentence imposed without a concomitant inquiry into prejudice. This is so precisely because the impact of the omission on a discretionary decision is usually enormously difficult to ascertain." State v. Keathly, 145 S.W.3d 123, 126 (Tenn. Crim. App. 2003) (quoting United States v. De Alba Pagan, 33 F.3d 125, 129-30 (1st Cir. 1994)) (footnotes omitted).

The State contends that the appellant waived this issue because she did not object when the trial court ruled on sentencing before hearing her statement and that, in any event, the trial court did not outright deny the appellant's request to be heard. However, the record reflects that the appellant's attorney asked if the trial court would hear the appellant's statement, and the trial court said that it did not believe the appellant could say anything to change the court's ruling. In our view,

the court was refusing to hear the appellant's statement. We refuse to conclude that the appellant waived this issue when she failed to argue with the court. We also hold that the trial court erred by denying the appellant her statutory right to allocution. Moreover, in light of the error discussed in the previous section, we cannot conclude that the error was harmless. Therefore, the trial court's refusing to hear the appellant's statement constitutes reversible error.

III. Conclusion

Based upon the record and the parties' briefs, we conclude that the trial court committed reversible error and vacate the appellant's convictions without prejudice to further proceedings on the underlying charges. The case is remanded to the trial court.

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NORMA McGEE OGLE, JUDGE